

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOHNATHAN TORRES HERNANDEZ,
Petitioner.

No. 2 CA-CR 2015-0085-PR
Filed April 8, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County

No. CR2010140049001DT

The Honorable Kristin Hoffman, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

The Ferragut Law Firm, P.C., Phoenix
By Ulises A. Ferragut Jr.
Counsel for Petitioner

STATE v. HERNANDEZ
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Charged with two counts of sexual conduct with a minor and one count of child prostitution, petitioner Johnathan Hernandez was convicted after a jury trial of one count of sexual abuse of a minor, a dangerous crime against children, and sentenced to a mitigated prison term of eighteen years. After appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), this court affirmed the conviction and affirmed the sentence as modified to include an additional day of presentence incarceration credit. *State v. Hernandez*, No. 1 CA-CR 11-0717 (memorandum decision filed Feb. 7, 2013). In this petition for review, Hernandez challenges the trial court's order denying his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in which he asserted claims of ineffective assistance of trial counsel.

¶2 We will not disturb the trial court's ruling unless it clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007); *see also State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006) ("We review for abuse of discretion the superior court's denial of post-conviction relief based on lack of a colorable claim."). Hernandez contended in his Rule 32 petition that trial counsel had been ineffective in advising him to proceed to trial and reject a plea agreement the state had offered. He also claimed counsel asserted a "faulty and legally unrecognizable and improper defense" at trial: that Hernandez thought the thirteen-year-old victim was eighteen years of age. The trial court denied relief without an evidentiary hearing.

STATE v. HERNANDEZ
Decision of the Court

¶3 In his petition for review, Hernandez argues the trial court abused its discretion in denying relief, insisting that at a minimum, he raised a colorable claim and was entitled to an evidentiary hearing. To raise a colorable claim of ineffective assistance of counsel, “a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68, *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). “A defendant establishes prejudice if [h]e can show a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.* ¶ 25, *quoting Strickland*, 466 U.S. at 694. “Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim.” *Id.* ¶ 21.

¶4 In its thorough ruling, the trial court identified the claims Hernandez had raised, applied the correct legal standards and authorities in evaluating them, and considered the record before it, specifically noting and quoting relevant portions. The record supports the court’s finding that the defense trial counsel presented was not that Hernandez mistakenly had believed the victim was eighteen; rather, he denied having had sexual intercourse with her or having otherwise penetrated her vagina, as she told police and as she testified at trial. The defense strategy was to show the victim was not credible, as demonstrated by the fact that she had lied about her age, fabricated the events, and set up a “scam,” with her brother’s aid, to extort money from Hernandez. And although trial counsel attempted to circumvent the statutory language limiting the defense that the defendant believed the victim was at least eighteen years of age to situations in which the victim is fifteen, sixteen or seventeen, *see* A.R.S. § 13-1407(B), (F), counsel ultimately conceded that defense did not apply and expressly so stated during the settling of jury instructions.

¶5 Similarly, the record supports the trial court’s ruling on Hernandez’s related claim that trial counsel had been ineffective in connection with plea negotiations. Hernandez did not, as he insists in his petition for review, raise a colorable claim that he had rejected the state’s plea offer because counsel erroneously told him he could

STATE v. HERNANDEZ
Decision of the Court

assert as a defense that the victim had told him and he had believed she was eighteen and could, therefore consent to sexual conduct.

¶6 To state a colorable claim, a defendant must do more than contradict what the record plainly shows. See *State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998). The court may, as it did here, make a threshold assessment of the credibility of assertions in affidavits based on the nature of those assertions and the record. *State v. Krum*, 183 Ariz. 288, 294-95, 903 P.2d 596, 602-03 (1995); see also Ariz. R. Crim. P. 32.6(c) (permitting summary dismissal of petition). Thus, the court properly may reject a claim without an evidentiary hearing when the claim is based on an affidavit that lacks a “reliable factual foundation” and “some substantial evidence” to support it. *Krum*, 183 Ariz. at 294-95, 903 P.2d at 602-03.

¶7 The transcript from the settlement conference shows the prosecutor told Hernandez the victim’s consent was not a defense. And again, Hernandez maintained, during trial and at sentencing, that he did not have sexual intercourse with the victim or digitally penetrate her vagina, not that he engaged in these charged acts but had believed she was eighteen years old. Given the outcome of the trial, the record also supports the trial court’s finding that Hernandez was not prejudiced by the rejection of the plea offer; he would have been required to enter a guilty plea to child prostitution, with a sentencing range of thirteen to twenty-seven years, and guilty pleas to two amended counts of attempted child molestation, requiring two lifetime probation terms.

¶8 Hernandez has not sustained his burden of establishing the trial court abused its discretion in denying relief summarily. We grant Hernandez’s petition for review but deny relief.